

1992

# Salt Lake City v. Maureen McGuire : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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SALT LAKE CITY,	:	
Plaintiff/Appellee,	:	
v.	:	
MAUREEN MCGUIRE,	:	Appeal No. 920478-CA
Defendant/Appellant.	:	Priority No. 2

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BRIEF OF APPELLANT

Appeal from a judgment and conviction for Telephone Harassment, a Class B misdemeanor, in violation of Salt Lake City Code § 11-08-030, in the Third Circuit Court in and for Salt Lake County, State of Utah, the Honorable Michael L. Hutchings, Judge, presiding.

**UTAH COURT OF APPEALS**  
**BRIEF**

UTAH

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court pursuant to Rule 26(2)(a) of the Utah Rules of Criminal Procedure and Utah Code Ann. § 78-2a-3(2)(d)(1953 as amended), whereby the defendant in a circuit court criminal action may take an appeal to the Court of Appeals from a final order on a misdemeanor offense, whether it is a conviction or a plea.

STATEMENT OF THE ISSUE

1. Was the evidence sufficient to sustain Appellant's conviction for Telephone Harassment?

STATUTES AND CONSTITUTIONAL PROVISIONS

Salt Lake City Code § 11-08-030

A. A person is guilty of Telephone Harassment if, with intent to annoy or alarm another, he/she:

1. Makes a telephone call, whether or not a conversation ensues, without purpose or lawful communication, including but not limited to making a call or calls and then terminating the call before conversation ensues; or
2. Makes repeated, unwanted telephone calls at extremely inconvenient hours; or
3. Insults, taunts, or challenges another by use of telephone communication in a manner likely to provoke a violent or disorderly response; or
4. Telephones another and knowingly makes any false statements concerning injury, death, disfigurement, indecent conduct or criminal conduct of the person telephones or any member of his/her family, or uses obscene, profane, or threatening language with intent to terrify, intimidate, harass or annoy. The making of a false statement as herein set out shall be prima facie evidence of intent to terrify, intimidate, harass or annoy.

B. Telephone Harassment is a Class B. misdemeanor.

### STATEMENT OF THE CASE

On July 7, 1992, Appellant was convicted, by the Honorable Michael L. Hutchings of Telephone Harassment, a Class B misdemeanor, in violation of Salt Lake City Code § 11-08-030 (T. 34). The court sentenced her to have no contact with the victim; attend an anger management course with proof to the court by November 1, 1992; attend mental health counseling with proof to the court by November 1, 1992; and 180 days in jail, 175 of which was suspended with the remaining 5 days to be completed by performing community in lieu of jail by November 1, 1992. This sentence was stayed pending the outcome of this appeal.

### STATEMENT OF FACTS

Peggy Sue Taylor Patterson, an acquaintance of Appellant's mother, testified that on December 28, 1991, at approximately 10:31 p.m., the first in a series of harassing phone calls was received at her home (T. 1). This first phone call was answered by Mrs. Taylor's four-year-old daughter (T. 2,13). She did not talk to the person on the other end of the phone, but did talk to the individual when later calls were received (T. 3).

A series of seven calls were received between 10:31 p.m. and 11:53 p.m. December 28, 1991 (Addendum A Page 1). Mrs. Taylor contacted the police, and upon arriving at her home, allegedly heard a voice on the other end. The individual on the other end was not identified. These calls were received between 12:01 a.m. and 12:15 a.m. on December 29, 1991 (T. 4-5). Recommendations from police



dispatch and the officer, to Mrs. Taylor consisted of keeping track of the calls made and the time they were received (T. 5-6). She kept track of these calls by writing the times calls were received and what was said (T. 6). This log was admitted at trial for the limited purpose that calls were received not for the identification of who made the calls (T. 6, Addendum A Page 1).

Mrs. Taylor testified she knew the Appellant for two to three years (T. 7-8). She had never talked to the Appellant except for twelve brief conversations over the phone when she (Mrs. Taylor) attempted to call Appellant's mother (T. 9,10). This was over the course of two years and were two minutes in length at the most (T. 11). The calls in question received by Mrs. Taylor on December 28 and 29 of 1991, were much shorter in duration than earlier calls between Appellant and Mrs. Taylor (T. 12). Although the calls in question were much shorter in duration, Mrs. Taylor testified she felt it was Appellant's voice she heard on the other end of the phone, except for one call received at 12:01 p.m. December 29, 1991, which was from Lisa Larsen (T. 5,9,12). Even with Mrs. Taylor's alleged identification, she was not able to state how she knew this was Appellant's voice (T. 10). There was not one distinction or one characteristic that could be explained (T. 10).

James Richard Butters, Mrs. Taylor's husband, testified that he was home when the calls were received (T. 13). He claimed the voice he heard when he answered the phone at 11:51 p.m. on December 28, 1991, was the Appellant's (T. 14). Mr. Butters claimed to be a long-time friend of the family and has spoken to Appellant at least

ten times on the telephone over the course of twenty years (T. 15). When asked to describe any characteristics that would make Appellant's voice immediately identifiable, Mr. Butters could not name one (T. 16).

Lisa Larson, Appellant's niece, testified that she made one phone call to Mrs. Taylor's home December 29, 1991 at approximately noon (T. 18-19, Addendum p.1). This call was made at the request of Appellant because Miss Larson knew the phone number, and because Appellant was upset because police officers were sent to her home by Mrs. Taylor the night before.(T. 17,22).

Jamie Masterson, Appellant's fourteen-year-old daughter, testified that she was home with her cousin and Appellant December 28, 1991 (T. 27). While she was playing with her cousin, she saw Appellant make one phone call which ended with Appellant singing into the phone (T. 28). That was the only phone call she saw Appellant make and Appellant was in the same room with Miss Masterson all night (T. 29). This call was made before police officers arrived at her home (T. 28-29). After the officers left, Miss Masterson and her cousin discussed the incident and ate some food (T. 29). During that period of time, there were no phone calls made by Appellant (T. 29).

Appellant testified she made two phone calls between 10:30 p.m. and midnight December 28, 1991 (T. 21). These were calls to a friend who was not home, and after the answering machine came on, she sang a song into the phone (T. 21). Appellant admitted that on December 29, 1991, she asked Lisa Larson to make the one and only call to Mrs. Taylor (T. 22,25).

According to Appellant's testimony, she and Mrs. Taylor have talked on the phone twenty or twenty-four times (T. 24). Appellant also stated that she had not met Mr. Butters and had not had any telephone conversations with him (T. 25).

#### SUMMARY OF ARGUMENT

Contrary to the court's conclusion, there was no other evidence linking Appellant to the telephone calls except the one call made by Lisa Larson for Appellant. Prior familiarity with Appellant's voice was insufficient inasmuch as there were no particular characteristics that could be linked to Appellant's voice and there were no lengthy conversations between Appellant and Mrs. Taylor and Mr. Butters. Because there was insufficient evidence of Appellant's guilt, this court should reverse her conviction and bar her retrial.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT

Appellant was convicted of Telephone Harassment, defined by Salt Lake City Code § 11-08-030 as follows:

A. A person is guilty of Telephone Harassment if, with intent to annoy or alarm another, he/she:

1. Makes a telephone call, whether or not a conversation ensues, without purpose or lawful communication, including but not limited to making a call or calls and then terminating the call before conversation ensues; or
2. Makes repeated, unwanted telephone calls at extremely inconvenient hours; or
3. Insults, taunts, or challenges another by use of telephone communication in a manner likely to provoke a violent or disorderly response; or
4. Telephones another and knowingly makes any false statements concerning injury, death, disfigurement, indecent conduct or criminal conduct of the person telephones or any member of his/her family, or uses obscene, profane, or threatening language with intent to terrify, intimidate, harass or annoy. The making of a false statement as herein set out shall be prima facie evidence of intent to terrify, intimidate, harass or annoy.

B. Telephone Harassment is a Class B. misdemeanor.

Inasmuch as Appellant's case was tried to the bench, the standard of review discussed in State v. Wright, 744 P.2d 315 (Utah App. 1987) applies. As this court explained in that opinion,

"[I]f the findings, (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside." [State v.] Walker, 743 P.2d [191,] 193 [(Utah 1987)]. Application of this new standard does not eliminate the traditional deference afforded the factfinder to determine the credibility of the witnesses.

Wright at 317. Review of the Court's assessment of the evidence in this case in light of the record of the trial must lead to the conclusion that the city failed to prove Appellant guilty of Telephone Harassment.

The Court's ruling was as follows:

After hearing the evidence in the case, I find the defendant guilty of the offense. I'm convinced of guilty beyond a reasonable doubt. I'm finding that the calls were made by the defendant. The witnesses that testified for the prosecution stated they could recognize the voice of the defendant. There has been some history between them of bad blood, bad feelings. I'm finding that they spoke on the phone on enough occasions to where they could identify the voice that was there. I'm also persuaded by the testimony of Miss Larson about the event that took place the next day. Again, a phone call was initiated by the defendant through the mechanism or means of having Miss Larson make the phone call. Now it is close enough in time and I'm finding that, and concluding I just don't have a reasonable doubt as to the identity of the person that made the phone calls. Clearly the phone calls were harassing and in violation of the city ordinance and for those reasons I find the defendant guilty of the offense.

(T. 34-35).

The trial court's assessment of the evidence was improper because the only consideration given to any of the evidence was a

call made the following day for Appellant, and the alleged conversations between Mrs. Taylor, Mr. Butters, and Appellant the night the calls were made.

In rejecting Appellant's version of the circumstances surrounding the calls, the trial court discounted the credibility of the one witness who was with Appellant the night the calls were made, Jamie Masterson. Miss Masterson testified that she observed Appellant make a phone call after which Appellant sang into the phone (T. 28). After that point, she did not see Appellant make any other calls (T. 29). The fact that she is Appellant's daughter is a bias, but certainly not enough to lie about the number of phone calls that Appellant made.

When voice identification is the only evidence presented, that identification alone cannot support a conviction unless there is shown (1) prior familiarity with the voice of the identified person or, (2) some peculiarity of the person's voice that makes it readily identifiable, State v. Booker, 709 P.2d 342, 345 (Utah 1985) (citing State v. Karas, 136 P. 788 (Utah 1913)). In the present case, Mrs. Taylor stated she had known Appellant for two to three years, but had only talked with her twelve times on the telephone (T. 10). Even then, the length of the conversation was no more than two minutes (T. 11). Although the length of the calls made was not determined, Mrs. Taylor also stated they were much shorter than two minutes (T.12). Mr. Butters also stated he had spoken with Appellant ten times over the course of twenty years (T.15). Twelve phone calls over the course of three years, which were no more than two minutes in length is not enough to develop familiarity with the voice of the identified person.

Mrs. Taylor and Mr. Butters could not identify any characteristics of the voice heard on the phone (T. 10,16). Voice identification alone is considered insufficient to support a conviction unless shown to be especially reliable. State v. Karas, 136 P. at 490. If there had been other evidence, even circumstantial, that would contribute to the voice identification it would provide a sufficient evidentiary basis to support the decision. In this case, there was no circumstantial evidence. See State v. Kilpatrick, 173 P.2d 284, at 285 (Utah 1946). There also were no clear facts to show identity and no personal identification by the caller. Clearly there were not enough evidence from which to draw an inference that Appellant was the caller. See State v. Nickles, 723 P.2d 123, 128-129 (Utah 1986).

In resting Appellant's conviction on the strength of the identification, the trial court ruled against the clear weight of the evidence.

#### CONCLUSION

Because the Court's findings were against the clear weight of the evidence, this Court should reverse Appellant's conviction, declaring her innocent as a matter of law. State v. Murphy, 617 P.2d 399, 403 (Utah 1980).

Respectfully submitted this 18 day of December, 1992.

*Leshia Lee-Dixon*  
LESHIA LEE-DIXON

CERTIFICATE OF DELIVERY

I, LESHIA LEE-DIXON, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and two copies to the City Prosecutor's Office, 451 South 200 East, Salt Lake City, Utah 84111, this 18 day of December, 1992.

Leshia Lee-Dixon  
LESHIA LEE-DIXON

DELIVERED/MAILED this 18 day of December, 1992.

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## ADDENDUM A

#Case 91-135120

Saturday Dec, 28, 1991

10:31 4-year-old daughter answers phone and hears all she has

11:01 Slut, Bitch

1:15 your wife a Bitch. pro, Where,

1:31 your wife a Bitch

1:51 I'm going to blow your head off  
Bitch Slut

11:52 you should trade your wife in for  
a new one, that not a bitch slut more  
4 slut

11:53 hang up just (laughing)

Sunday Dec 29, 1991

12:01 am officer Liverno answers, and hear the shit,

12:03 am officer Liverno answers, and listen to the  
shit

2:15 am I'll you think that you scare me bitch  
try again

10:52 Slut. Bitch

10:53 called hang up

10:54 good luck bitch

535-7767

12:01 pm tape

12:12 pm Lisa Larsen & Marlene (called back for)  
(595-6283)

4:57 watch out Bitch I'm coming

5:07 Slut

Monday Dec 30, 1991

10:15 am I'm going to blow your head off

2:27 I hope you lose your head bitch

5:17 your fucking died Bitch